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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON
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6 LINDSEY R. TOFSRUD,

7 Plaintiff,

8 vs.

9 JOHN E. POTTER, Postmaster; DAVID
10 KENNEDY, et ux; the UNITED STATES
11 OF AMERICA,

12 Defendants.

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) No. CV-10-090-JLQ
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) ORDER ON MOTION TO
) DISMISS
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13 Before the court is the Defendants' Motion To Dismiss (C.R. 21) noted for hearing
14 without oral argument for August 17, 2010.

15 **FACTUAL and PROCEDURAL BACKGROUND**

16 Plaintiff alleges in her First Amended Complaint that in December of 2007, the
17 Plaintiff commenced employment as a seasonal worker at the United States Postal
18 Service (USPS) Processing and Distribution Center in Spokane, Washington.
19 Commencing in February of 2008, Plaintiff was employed by the USPS in Spokane as
20 a casual clerk, which was a full time but not a career position and without career
21 termination protections. Plaintiff alleges that the Defendant David Kennedy was the
22 Plaintiff's supervisor with actual or apparent authority over the Plaintiff. Plaintiff alleges
23 that commencing in April or May of 2008, Defendant Kennedy "began making rude and
24 harassing comments to plaintiff (sic) and tormenting her regularly." Plaintiff further
25 alleges that Kennedy physically assaulted her by striking her in the face. Kennedy denies
26 that allegation and in turn claims this amounted to a finger pointing incident. Plaintiff
27 admits she did not file any "formal" complaints of Kennedy's conduct, allegedly because

1 of intimidation by Kennedy and fear of termination by Kennedy.

2 Plaintiff further alleges in her First Amended Complaint that by reason of the
3 conduct of Kennedy she gave notice on November 7, 2008 of resignation from her
4 position effective November 28, 2008. On her final workday, November 25, 2008, the
5 Plaintiff was interviewed by USPS personnel when she allegedly provided detailed
6 information as to the hostile work environment and harassment by Kennedy, including
7 the alleged assault and battery. Plaintiff first contacted a postal agency EEOC counselor
8 on February 2, 2009. She was interviewed on February 2, 2009 and filed a formal EEOC
9 complaint on March 26, 2009.

10 Plaintiff commenced this action in Spokane Count Superior Court on February 5,
11 2010. The United States removed the action to this court on April 2, 2010. The United
12 States then filed a notice of its substitution as a Defendant in place of David Kennedy as
13 to actions alleged taken by Kennedy as a postal employee. On April 5, 2010, the
14 Government filed a Motion For More Definite Statement (C.R. 2) which, after several
15 extensions of time requested by counsel, was granted by the court's Order of May 24,
16 2010. That Order authorized the Plaintiff to respond to the More Definite Statement
17 Motion by the filing of an Amended Complaint. The First Amended Complaint was filed
18 on May 26, 2010 (C.R. 15).

19 **MOTION TO DISMISS ISSUES and RULINGS**

20 The Plaintiff first seeks to have the Motion To Dismiss denied on procedural
21 grounds, contending that the Defendants are in default by reason of their failure to file
22 an Answer to the First Amended Complaint and the alleged violation of Federal Rule of
23 Civil Procedure (FRCP) 12(g)(2) which prohibits the filing of successive motions.
24 However, such Rules do not prohibit the filing of a Motion To Dismiss before answering
25 challenging the failure to state claims after the filing of the Amended Complaint pursuant
26 to the court's Order. Plaintiffs also claim the Motion To Dismiss should be denied since
27 the Defendants have not yet filed their Answer to the First Amended Complaint.

1 However, the filing of a Motion To Dismiss defers the time for the filing of the Answer.
2 Plaintiff also seeks to have the Motion To Dismiss denied pursuant to FRCP 12(d),
3 contending that the Defendants alleged matters outside the pleadings. However, the court
4 will only consider matters within the pleadings and those that are uncontested. Therefore
5 the Plaintiff's request to deny the Motion to Dismiss on procedural grounds is DENIED.

6 COUNTS 1, 2, & 3-EMPLOYMENT RELATED CLAIMS

7 The Government seeks to dismiss the Plaintiff's Title VII claims of discrimination,
8 harassment, and retaliation against the Defendant Kennedy. The Government also seeks
9 to dismiss the claims against the Postmaster by reason of the failure of the Plaintiff to file
10 a timely EEOC claim. The Plaintiff in turn seeks to avoid dismissal by claiming that the
11 alleged wrongful action of Kennedy can be made the basis of a state claim of wrongful
12 discharge, harassment, and hostile work environment constituting a violation of the
13 public policy of the state of Washington. However, such state law claims must be
14 dismissed since it is clear that Title VII is the exclusive remedy for federal employment
15 discrimination, including harassment. *Brown v. General Services Administration*, 425
16 U.S. 820, 829. Title VII does not allow claims against individual federal employees other
17 than against the head of the agency who must be the named defendant. 42 U.S.C. §
18 2000e-16e. Further, to the extent the Plaintiff bases her employment claims on state law,
19 such claims must be dismissed since other than Title VII claims, adverse personnel and
20 employment claims are limited by the federal Civil Service Reform Act and the Federal
21 Employees Compensation Act. *Mangano v. United States*, 529 F. 3d 1243 (9th Cir. 2008)
22 and *Figuro v. United States*, 7 F. 3d 1405, 1407 (9th Cir. 1993).

23 Counts 1, 2, & 3, the Title VII employment and state law employment claims, must
24 be and are Dismissed as to the Defendant Kennedy.

25 The Defendants further assert that the Title VII Claims 1, 2, and 3 must be
26 dismissed against all Defendant by reason of the failure of the Plaintiff to timely exhaust
27 her administrative remedies through the filing of a complaint with the EEOC within 45

1 days of the alleged discriminatory act as required by 29 C.F.R. § 1614.105(a). In her
2 response to the Motion To Dismiss the Plaintiff does not address this Title VII EEOC
3 complaint requirement. The earliest possible date of a possible complaint by the Plaintiff
4 was on November 25, 2008, and thus any Title VII claims against the Postmaster arising
5 prior to October 10, 2008, must be Dismissed.

6 The Defendant's Motion To Dismiss Counts 1, 2, & 3, the Title VII claims, is
7 Granted to the extent that no conduct prior to October 10, 2008, may be the basis for such
8 claims against the Defendant Postmaster.

9 The final issue raised by the Government as to the Title VII Count 3 is that the
10 Plaintiff has not alleged that the alleged retaliation against her arose out of "protected
11 activity" on the part of the Plaintiff that was the basis for alleged adverse action against
12 her. *Ray v. Henderson*, 217 F. 3d 1234, 1240 (9th Cir. 2000). While further development
13 of the facts in this matter may or may not establish that the Plaintiff was engaged in
14 "protected activity," based upon the allegations of the First Amended Complaint, the
15 court determines that the Motion To Dismiss the Title VII retaliation allegations against
16 the Postmaster in Count 3 shall at this juncture of the case be Denied.

17 COUNTS 4 & 5-ASSAULT/BATTERY & NEGLIGENCE

18 The Government has moved on various grounds to dismiss the assault and battery
19 claims against it as well as those claims against the Defendant Kennedy. No Federal Tort
20 Act claim has been filed by the Plaintiff. However, the Plaintiff concedes that it is not
21 pursuing the assault and battery claims against the United States. As to the negligence
22 claim against the United States existing by reason of the Government's substitution as the
23 Defendant in lieu of the defendant Kennedy, the court finds that such a claim against the
24 United States is barred by reason of the failure of the Plaintiff file a claim with the
25 appropriate agency as required by 28 U.S.C. § 2675(a). The negligence claim against the
26 Defendant Kennedy is precluded by 28 U.S.C. § 2679 where the United States has been
27 substituted for the individual government employee.

1 The court finds that the common law assault and battery claim against the
2 Defendant Kennedy has been properly pled and a Federal Tort Claims Act claim was not
3 required prior to the institution of the action. The Motion To Dismiss the assault and
4 battery claims against the Defendant Kennedy is Denied, but Granted as to all other
5 Defendants including the negligence claim against the Defendant Kennedy.

6 COUNT 6-VICARIOUS LIABILITY

7 The Plaintiff at page 22 of her response to the Motion to Dismiss concedes, in
8 effect, any claim for vicarious liability on the part of the Government or the Postal
9 Service as being duplicative and the court therefore dismisses Claim 6 subject to the
10 liability of the Government on the Title VII claims.

11 COUNT 7-CONSTITUTIONAL & STATUTES CLAIMS

12 The Government also seeks to dismiss the claims based upon the Washington State
13 and United States constitutions set forth in Count 7. The Plaintiff, in her response to the
14 Motion To Dismiss, at page 23, line 7 states that “the Plaintiff simply asserts violation
15 of law and does not describe ‘Count 7’ as a cause of action.” Plaintiff seeks to establish
16 a violation of “public policy.” Since, pursuant to this Order, the Plaintiff’s claims are
17 limited to those under Title VII and the common law tort claims against the Defendant
18 Kennedy, evidence of “public policy” is not relevant to the employment claims which are
19 controlled by federal law. To the extent stated herein, the Motion To Dismiss Count 7
20 is Granted.

21 Based upon the foregoing, IT IS HEREBY ORDERED that the Defendants’
22 Motion To Dismiss (C.R. 21) is Granted in Part and Denied in part as stated herein.

23 The Clerk shall enter this Order and furnish copies to counsel.

24 Dated this 23rd day of August, 2010.

25 s/ Justin L. Quackenbush
26 JUSTIN L. QUACKENBUSH
27 SENIOR UNITED STATES DISTRICT JUDGE
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